

**DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS: 9700411
WITHHOLDING AND GROSS RETAIL TAXES
For the 1992 to 1996 Tax Years**

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of the document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Unpaid Withholding Tax Levied Against Taxpayer as Responsible Corporate Officer.

Authority: IC 6-3-4-8(g); IC 6-8.1-5-1(b); Indiana Dept. of State Revenue v. Safayan, 654 N.E.2d 270 (Ind. 1995).

The taxpayer has protested the imposition of personal liability for unpaid withholding taxes based upon the taxpayer's status as a responsible corporate officer.

II. Liability for Unpaid Gross Retail Taxes Levied Against Taxpayer as a Responsible Corporate Officer.

Authority: IC 5-2.5-9-3; IC 6-8.1-5-1(b); Indiana Dept. of State Revenue v. Safayan, 654 N.E.2d 270 (Ind. 1995).

The taxpayer has protested the imposition of personal liability for unpaid gross retail taxes based upon the taxpayer's status as a responsible corporate officer.

STATEMENT OF FACTS

Following receipt of a proposed assessment for unpaid taxes, the taxpayer submitted a protest letter to the Department on July 16, 1997. In that letter, the taxpayer indicated that he did not dispute the fact that he owed taxes but that he questioned the amount of taxes claimed by the Department. The taxpayer requested and received information suggesting the manner in which a written brief could be prepared and submitted to the Department in lieu of a face-to-face hearing. The taxpayer was given a deadline by which to submit the written information or by which to request an extension of time. Taxpayer declined to respond. The taxpayer was given a second deadline by which to submit the information, request an in-person hearing, or request an extension of time. The taxpayer declined to

respond. The taxpayer was given a third deadline by which to submit the information, request an in-person hearing, or request an extension of time. The taxpayer declined to respond. Accordingly, this Letter of Findings has been prepared based upon the limited information contained within the taxpayer's initial 1997 protest letter.

DISCUSSION

I. Unpaid Withholding Tax Levied Against Taxpayer as Responsible Corporate Officer.

Taxpayer apparently protests the assessment of levies for unpaid withholding taxes on the ground that he was not a responsible officer and that the amount of the levies is incorrect.

Withholding taxes may be assessed against a responsible corporate officer under the provisions of IC 6-3-4-8(g) which states that "[i]n the case of a corporate or partnership employer, every officer, employee, or member of such employer, who, as such officer, employee, or member is under a duty to deduct and remit such taxes shall be personally liable for such taxes, penalties, and interest."

Under the provisions of IC 6-3-4-8(g), any individual can be held personally liable for unpaid withholding taxes if (1) he was an officer, employee or a member of the employer, and (2) he had a duty to remit taxes to the Department. Indiana Dept. of State Revenue v. Safayan, 654 N.E.2d 270, 273 (Ind. 1995). In determining whether a taxpayer had the authority to see that withholding taxes were paid, the court will look at three relevant factors. The court will look to the person's position within the power structure of the corporation. Where that person is a high ranking officer within the corporate power structure, that person is presumed to have had sufficient control over the company's finances sufficient to give rise to a duty to remit trust taxes. That presumption may be rebutted by a showing the officer did not in fact have such authority.

Second, the court will look to the authority of the officer as established by the articles of incorporation, bylaws, or the officer's employment contract.

Third, the court will consider whether the person actually exercised control over the finances of the business including whether the person controlled the corporate bank account, signed corporate checks and tax returns, or determined when and in what order to pay corporate creditors.

Taxpayer bears the burden of demonstrating that the proposed assessment has been incorrectly levied against a person who is not a responsible officer. Similarly, the taxpayer bears the burden of demonstrating that the amount of the proposed levy is incorrect. Under IC 6-8.1-5-1(b), the "notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made."

The taxpayer has presented no evidence regarding his authority within the business for which withholding taxes remain unpaid. Taxpayer has submitted no evidence regarding the degree of control taxpayer was empowered to exercise over the finances of the business. The taxpayer has submitted no evidence regarding the degree of authority conferred on him by his employment contract, the articles of incorporation, or the business by-laws. Accordingly, the taxpayer has failed to meet the burden of proof necessary to avoid responsible officer liability for unpaid withholding taxes.

FINDING

Taxpayer's protest is respectfully denied.

II. Liability for Unpaid Gross Retail Taxes Levied Against Taxpayer as a Responsible Corporate Officer.

The taxpayer has protested the imposition of liability for unpaid gross retail taxes. Under the provisions of IC 6-2.5-9-3, "[a]n individual who: (1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and (2) has a duty to remit state gross retail or use taxes to the department; holds those taxes in trust for the state is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state."

The standard for establishing responsible officer liability for unpaid gross retail taxes is also set out in Safayan, 654 N.E.2d at 273 which states that "[t]he method of determining whether a given individual is a responsible person is the same under the gross retail tax and the withholding tax." Similarly, in order for the taxpayer to avoid responsible officer liability for the unpaid gross retail tax, taxpayer must meet the burden of proof and the presumptions as set out in IC 6-8.1-5-1(b). Similarly, the taxpayer has failed to set out any factual basis upon which to rebut the presumption of correctness afforded the proposed assessment for unpaid gross retail taxes. Therefore, consistent with the Department's finding concerning taxpayer's liability for unpaid withholding taxes, the taxpayer cannot avoid liability for unpaid gross retail taxes held in trust for the state of Indiana.

FINDING

Taxpayer's protest is respectfully denied.